REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO.42 OF 2020

CHINA WI YU COMPANY LIMITED.....APPELLANT

AND

RONALD MANTHI DAVID.....RESPONDENT

(Being an appeal from the Judgment of the Honourable Senior Principal Magistrate C.A Ocharo, delivered on 21/05/2020 in Chief Magistrate's court at Machakos, Case No. 782 of 2018)

BETWEEN

RONALD MANTHI DAVID.....PLAINTIFF

VERSUS

CHINA WI YU COMPANY LIMITED.....DEFENDANT

JUDGEMENT

1. The Respondent herein, **Ronald Manthi David**, by a plaint dated 11th December, 2018 sued the Appellants, **China Wi Yu Company Limited**, claiming General Damages for pain and suffering, loss of amenities and future medical expenses; Special Damages of Kshs 97,150.00, Future Medical Expenses, Costs of the suit and interest.

2. According to the plaint, the Appellant was the sole registered owner of motor vehicle Reg. No. KBQ 336U while the 2nd Appellant was the beneficial owner thereof.

3. It was pleaded that on or about 9th July, 2017, the Respondent was lawfully walking off the road along Machakos-Kangundo Area when motor vehicle registration no. KBS 559T, which was registered in the name of the Appellant, was driven by the Appellant's agent, servant and/or driver so fast, negligently, carelessly and dangerously that it lost control, veered off the road and ran over the Respondent thereby causing him serious injuries. The particulars of negligence, injuries and special damages were set out in the plaint.

4. On its part the Appellant, in its defence, denied ownership of the said vehicle as well as the facts relating to the occurrence of the accident. It also denied that the Respondent was injured but pleaded that if such an accident occurred, it was caused by the negligence of the Respondent, particulars whereof were set out in the defence. It was sought that the suit be dismissed with costs.

5. Testifying as PW1, the Respondent relied on his witness statement where he stated that on9th July, 2017, he was lawfully walking off Machakos-Kangundo road when near Muindi Mbingu Secondary School area, motor vehicle registration no. KBS 559T was driven at a high speed, lost control, veered off the road and ran over him and he sustained the injuries particularised in the plaint. He was then taken to Bishop Kioko Hospital for treatment where he was admitted for one month and incurred expenses and was later issued with a police abstract. Upon conducting a search through his advocates, the Respondent found that the said vehicle was the Appellant's. He therefore blamed the owner and/or the driver of the said vehicle for driving the vehicle dangerously, carelessly and negligently and sought for compensation for the expenses he incurred and for the pain and suffering he endured as a result thereof.

6. In his oral evidence, he stated that he was standing off the road on the left next to the wall as he waited to cross when the lorry veered off the road and hit him. As a result, he fractured his leg and a metal implant was inserted while the other leg was grafted. He was admitted for a month at Bishop Kioko Hospital and he exhibited the discharge summary, bundle of receipts, p3 form, copy of the records and medical

report. It was his evidence that he had not recovered because the implant was yet to be removed.

7. In cross-examination, he maintained that he wanted to cross but was standing off the road and that the weather was dry. He stated that there were other vehicles on the road and that the lorry was not overtaking. Though he saw the lorry approaching, he believed that he was okay since he was of the road. Though he jumped onto the wall and grabbed some grass plants, it gave way he fell off. According to him, he spent Kshs 91,600/-

8. PW2, **PC Robbert Tomno**, testified that on 9th July, 2017, the Traffic Department, Machakos Police Station received a road traffic accident report that had taken place at Muindi Mbingu Area along Machakos-Kangundo Road at 4pm involving motor vehicle registration no. KBS 559T Tipper and a pedestrian, the Respondent. According to him, the vehicle which was owned by the Appellant hit the Respondent who was on the left as one faces Kangundo Direction as a result of which the Respondent was seriously injured and as a result an abstract was issued.

9. In cross-examination, he stated that he was not the investigating officer and that it was not indicated who was to blame. He admitted that the road was under construction and in his view, the dust led the driver to veer off the road. According to the report, the Respondent was standing off the road though the witness could not tell whether the vehicle was overspeeding.

10. PW3, **Dr Judith Kimuyu**, examined the Respondent on 5th July, 2018. The results of her examination were contained in her report which she exhibited. In her opinion, the Respondent had not fully recovered. In cross-examination, she stated that the Kshs 300,000/- stated in her report was in respect of a private setting though she admitted it would be cheaper in a public setting whose sum she could not tell.

11. After the close of the Plaintiff's case, the defence case was eventually closed without the defence adducing any evidence.

12. In her Judgement, the learned trial magistrate found that there was no other evidence to contradict that of the Respondent and PW2 that the lorry veered off the road and hit the Respondent despite the Respondent's attempts to avoid being hit. She therefore found that had the vehicle not veered off the road the accident would not have happened as there was no other explanation from the defence as to how the accident occurred since pleadings are not evidence. The court therefore found the Appellant 100% liable.

13. On quantum, she considered the authorities cited and awarded Kshs 1,000,000/- as general damages for pain and Kshs 300,000/- for future medical expenses pleaded and proved. She also awarded Kshs 97,150/- being special damages together with costs and interest.

14. In this appeal, it is submitted on behalf of the Appellant that it was incumbent upon the respondent to prove fault on the part of the appellant. In this regard the Appellant noted certain pointers such as the admission by the Respondent on cross-examination of seeing the lorry approach him; the confirmation by the police that the road was under construction and that caused the Appellants driver to veer of the road; the fact of the Respondent standing on the road at the time of the accident; and the fact of the matter pending under investigation.

15. It was submitted that the Respondent was the author of his injuries as he was standing on a road that was under construction and had seen the vehicle approach his direction. Reliance was placed on the decision in **Anne Wambui Nderitu (Suing as Administrator for the Estate of George Nderitu Kuria vs. Joseph Jiprono Ropkoi & Four By Four Safaris Co Ltd. (C.A. 345 of 2000**). Based on section 119 of the ***Evidence Act***, it was submitted that presumption of likely facts should avail and that the fact that the appellant did not call evidence is not a cushion against analysis of the evidence by the lower court since the appellant had no burden to discharge.

16. According to the Appellant, failure by the plaintiff to establish the exact circumstances of the accident rendered the finding on liability open to disturbance by this court and the Court was urged to find that no liability was established against the appellant.

17. As regards the quantum of damages, the Appellant cited Kisumu Civil Appeal No. 56 of 2014 - **Maselus Eric Atieno vs. Unitel Services Limited**, **Isaac Mwenda Micheni vs. Mutegi Murango [2004] eKLR,** Kisumu Civil Appeal No. 183 of 2010 - **Johnson Mose Nyaundi (Minor Suing Through Next Friend and Father Wilfred Wadimbe Nyaundi vs. Petroleum & Industrial Service Ltd,** and Nairobi High Court Civil Case No. 2068 of 2002 **- Hassan Noor Mahmoud vs. Tae Youn Ann** and submitted that a sum of Kshs. 250,000/= is sufficient and adequate compensation the same to be subjected to the contribution.

Determination

18. I have considered the foregoing. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

19. In **Coghlan vs. Cumberland (1898) 1 Ch. 704**, the Court of Appeal (of England) stated as follows -

> **"Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully**

weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."

20. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

21. However, in **Peters vs. Sunday Post Limited [1958] EA 424,** it was held that:

"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

22. Nevertheless, in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** the Court of Appeal held that:

"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

23. In this case, it is clear that the issue to be resolved is whether the respondent, based on the evidence presented before the Trial Court proved his case. Section 107(1) of the ***Evidence Act***, Cap 80 Laws of Kenya provides that:

Whoever desires* any *court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

24. This is called the legal burden of proof. There is however evidential burden of proof which is captured in sections 109 and 112 of the same Act as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the* knowledge *of any party to those proceedings, the burden of proving or disproving that fact is upon him.

25. The two provisions were dealt with in **Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334,** in which the Court of Appeal held that:

"As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act."

26. It follows that the initial burden of proof lies on the plaintiff, the respondent in this appeal, but the same may shift to the defendants, the

respondents in this case depending on the circumstances of the case.

27. In this case, the respondent's evidence was that he was standing off the road preparing to cross when he saw the Appellant's motor vehicle approaching. To avoid the said accident, he jumped onto the wall but unfortunately the grass plants which he grabbed gave way and he fell and he was hit by the said vehicle. According to him, the vehicle was being driven fast and according to PW2 the said road was under construction. That was the only evidence on record as the Appellant did not offer any evidence in rebuttal. In cases where the plaintiff's case is unchallenged the trial court cannot be faulted for not believing it.

28. It was contended that from the police abstract, the Respondent was standing on the road. I have perused the said report and nowhere is it indicated that the Respondent was standing on the road. PW2 was emphatic in is evidence that the report received was that the Respondent was standing off the road when the vehicle veered off and hit him.

29. As regards the fact of the matter pending under investigation, it should always be remembered that the decision of who to charge where a collision occurs rests on the police and the parties have no control over that decision. Therefore, the fact that the police decide to charge the driver or no not cannot be taken to be conclusive evidence of who is culpable. This was the position adopted by the Court of Appeal in **Calistus Ochien'g Oyalo & Others vs. Mr. & Mrs. Aoko Civil Appeal No. 130 of 1996**, where it was held that police do conduct their investigations for their purpose and a party cannot be expected to direct them on how to do it.

30. Therefore, proof of negligence being on a balance of probabilities does not solely depend on the evidence of the investigation officer. Negligence can be proved notwithstanding the fact that the accident in question was never reported to the police since there is no nexus between a report of an accident to the police with proof of negligence. While such report and the steps taken thereafter may be proof of the occurrence of the accident in question, where there is independent evidence proving that an accident took place and that it was caused by the negligence of the defendant, the fact that the civil case comes up for hearing while the traffic matter is still pending investigations is not necessarily fatal to the former. In **Peter Kanithi Kimunya vs. Aden Guyo Haro [2014] eKLR** it was held:

> **"A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was 'reported' at a particular police station."**

31. Even where the traffic proceedings are complete and decision made thereon, save for the fact that a person may be found liable therein, it does not necessarily follow that the person found culpable is the person solely liable for the occurrence of the accident. Nor does an acquittal automatically exonerate the person charged in those proceedings. In **Masembe vs. Sugar Corporation and Another [2002] 2 EA 434,** it was held that:

> **"It is trite and rudimentary that proceedings in a criminal case cannot be used to prove a cause of action in a civil suit although the record can be used for certain purposes, for instance, to contradict a witness by facing him with what the witness had stated in the trial of the criminal case. But the proceedings and the result of the criminal trial cannot be made the basis for proof of a civil claim…"**

32. I have subjected the evidence before the trial court to a re-evaluation and I find no basis for interfering with its findings on liability.

33. As regards the quantum, the Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> **"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."**

34. The same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** held that:

> **"The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect…A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own…"**

35. Similarly, in **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47**, the Court of Appeal held that:

> **"In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."**

36. I have considered the award made and the authorities relied upon. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in **Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730** where it was held that:

"It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated… The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment…It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award…it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion."

37. Before the trial court the Appellant proposed an award of Kshs 800,000.00 for general damages. The trial court was persuaded that the authorities cited by the Appellant were relevant but taking into account the inflation, she adjusted the award to meet the prevailing circumstances. I have no basis for interfering with her decision since in my view, the award made by the learned trial magistrate was well within the range of awards made in similar cases. Even if this court had been of the opinion that it would have awarded a different figure, that is not a ground for interfering with the award.

38. In the premises, I find no merit in this appeal which I hereby dismiss with costs. It is so ordered.

JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 29TH NOVEMBER, 2021.

G. V. ODUNGA

JUDGE

In the presence of:

MR MUTHAMA FOR THE RESPONDENT

MR KHAMALLA FOR THE APPELLANT

CA SUSAN